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In The

# Supreme Court of the United States

October Term, 1994

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS,

*Petitioners,*

versus

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY BRIEF FOR PETITIONERS INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

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## REPLY BRIEF

### A. THE FEDERAL DEFENSE IS THE ONLY ARTICLE III "CASE OR CONTROVERSY" THIS CASE PRESENTS; AND PETITIONERS HAVE STANDING TO CHALLENGE IT

Petitioners have noted that in an action removed to federal court under 28 U.S.C. § 1442(a) the existence of a federal defense is a constitutional prerequisite, for without it there is no Article III "case or controversy". *See, Mesa v. California*, 489 U.S 121, 136, 109 S.Ct. 968 (1989). (Petition, at pp. 6-12). In its opposition brief NIH charges that Petitioners "erroneously confuse the 'arising under' requirement of Article III with the 'case or controversy' requirement of Article III." (NIH Opposition, p. 9). In NIH's view, after satisfying the "arising under" requirement (or presumably some other Article III basis for a "case or controversy"), the plaintiff must yet meet Article III standing requirements which, in the words of *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), are "an essential and unchanging part of the case-or-controversy requirement." This may be so; but the fundamental flaw in NIH's reasoning comes when it carries its argument one step farther – to a conclusion that Petitioners can satisfy Article III's standing requirements only by reference to their *state-law claims*. Whether Petitioners have Article III standing with respect to their state law claims is irrelevant to determining whether they satisfy the "case or controversy" requirement.

As this Court determined in *Mesa*, the "case or controversy" requirement is met in a § 1442(a)(1) case by the assertion of a federal defense. There is in this case only

one federal controversy – the sovereign immunity defense asserted by Respondent Tulane, which "arises under" the Constitution. The federal defense is the only Article III "case or controversy" this case presents. Therefore, if NIH is correct in contending that Petitioners must also establish Article III standing as an element of the "case or controversy" requirement, their standing must be evaluated in terms of what presents, in this case, the actual case or controversy, *viz.*, the sovereign immunity defense.

As this Court observed in *IPPL*, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." 500 U.S. 72, 77, 111 S.Ct. 1700, 1704. Thus, the Court continued, reference must be made to *"the particular claims asserted." Id.* (emphasis in original). The issue arose in *IPPL* when NIH objected that Petitioners' lack of standing to pursue their state-law claims (as determined by the Fifth Circuit under Article III) divested this Court of jurisdiction to address the removal question on which *certiorari* had been granted. In dismissing NIH's contention, this Court properly looked *not* to the Petitioners' standing to seek protection of the monkeys (the underlying state claim), but rather, to their standing to challenge the removal. Significantly, it was the challenge to removal that presented the federal "case or controversy"; and applying traditional standing analysis, the Court determined that Petitioners had suffered "clear . . . injury" in the loss of their right to sue in the forum of their choice, which injury could be "fairly . . . traced" to NIH's removal and which would "likely . . . be redressed" if Petitioners prevailed because the case would be remanded. *Id. Cf., Asarco, Inc. v. Kadish*, 490 U.S.

605, 109 S.Ct. 2037 (1989) (standing to appeal decision on federal question not affected by lack of standing on underlying claim).

A similar analysis is warranted here. The assertion of a federal defense has injured Petitioners, authorizing the removal of their action from state court and the dismissal of their claims; the injury can be fairly traced to Tulane's assertion of the defense; and the injury is likely to be redressed if Petitioners prevail on their claim that the federal defense lacks merit because, if the sovereign immunity defense is found invalid, the Court may either decline to exercise jurisdiction over the pendent state law claims and remand to state court, or permit the action to go forward in federal court. Therefore, Petitioners clearly have standing to challenge the sovereign immunity defense. Petitioners' standing under Article III to seek protection of the monkeys or damages for their harm is no more relevant here than it was when this Court determined Petitioners' standing to challenge the removal in *IPPL*.

Indeed, assuming Petitioners' state claims satisfied Article III standing requirements, there still would be no federal "case or controversy" with respect to their requests for affirmative relief, simply because they do not fit within any Article III category.[1] Accordingly, the problem NIH poses – the lack of an Article III "case or

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[1] Article III, § 2 delineates "cases" and "controversies" which do not encompass Petitioners' state law claims:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all cases affecting Ambassadors, other public Ministers and

controversy" – cannot be resolved by NIH's proffered means – satisfaction of Article III standing requirements: a state-law claim held to federal standing requirements would remain neither a federal question, a diversity action, an admiralty suit, nor any other recognized "case" or "controversy."

Moreover, dismissal, the remedy which Respondents urge (and which the Fifth Circuit employed) for a perceived lack of subject matter jurisdiction, is legally unavailable. 28 U.S.C. § 1447(c) allows no discretion to dismiss rather than remand an action. Where subject matter jurisdiction is lacking, the statute declares that the removed case "*shall* be remanded." *IPPL*, 500 U.S. at 89, 111 S.Ct. at 1710 (emphasis in original). However, the right of the federal officer (or person acting under him) to have his defense heard in federal court makes remand on standing grounds an unsatisfactory option – albeit the only option. This apparent conundrum serves to point up the error of Respondents' analysis, which stems from the improper application of Article III standing guidelines to Petitioners' claims. Were attention properly focused on the federal defense – the basis of federal jurisdiction – then subject matter jurisdiction would clearly exist for consideration of the federal defense. If the defense were

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Consuls; – to all Cases of admiralty and maritime jurisdiction; – to Controversies to which the United States shall be a party; – to Controversies between two or more States; – between Citizens of different States; – between Citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof; and foreign States, Citizens or Subjects.

found unmeritorious, subject matter jurisdiction might be lost, a circumstance legitimately warranting remand.

For these reasons, the Court carefully framed its "open question" in footnote 4: "whether a federal court in a § 1442(a)(1) removal case *may* require plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises *pendent* jurisdiction." 500 U.S. at 78, n.4, 111 S.Ct. at 1705, n.4 (emphasis supplied). If Article III standing were a constitutional prerequisite to the assertion of Petitioners' state law claims, this Court would not have used the discretionary "may" in describing the issue; discretion is allowed precisely because the court exercises only "pendent" jurisdiction over the state-law claims in a § 1442(a)(1) removal case – the federal defense provides the case or controversy on which federal jurisdiction is premised.

Erroneously applying Article III standing requirements to Petitioners' state claims, neither the district court nor the Fifth Circuit have ever addressed the question raised by this Court. It is a question Respondents urge this Court to overlook, given the absence of any conflict among the circuits.[2] However, the disregard

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[2] Respondents IBR and Tulane further suggest that the issue was not raised in the district court. They point to the portion of Petitioners' brief raising a "different argument", which Respondents seem to suggest was the only argument. (IBR/Tulane Opposition, p.10). In the section immediately preceding that cited by Respondents, however, Petitioners specifically and at some length addressed the applicability of federal standing law to their state law claims. (Opposition Memorandum at 68-72). This issue was properly preserved for appeal.

demonstrated for the question raised by this Court has created its own conflict, resulting in an error of constitutional proportions and one that has done unnecessary violence to Louisiana law and the rights of these Petitioners.

This last element – of violence to state law and Petitioners' rights – provides the proper answer to the question the Court raised. Because § 1442(a)(1) seeks only to provide a federal forum, seeks not to displace the substantive laws of the states, and seeks neither to enlarge nor contract the rights of the parties, *Mesa v. California, supra, Arizona v. Manypenny*, 451 U.S. 232, 247, 101 S.Ct. 1657, 1664 (1981), an interpretation of the statute that results in the dismissal of state law claims maintainable in state court should not be countenanced. The fact that the state claims were dismissed for nonsatisfaction of federal standing requirements without any consideration of the validity of the federal defense which brought the case to federal court – the only federal controversy – emphasizes the error of the Fifth Circuit's interpretation of § 1442(a)(1).

Indeed, the draconian finality of the lower courts' remedy distinguishes the § 1442(a) removal from a § 1441 removal of a diversity or a federal question case. NIH, Tulane, and IBR suggest, with scant authority, that the federal courts routinely apply Article III standing requirements to such claims removed from state court. Be that as it may, the remedy for a failure of federal standing is simply remand to state court.[3] *See, M.A.I.N. v. Commissioner, Maine Dept. of Human Services*, 876 F.2d 1051 (1st

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[3] Respondents point to the decision in *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d

Cir. 1989); *Mangini v. R.J. Reynolds Tobacco Co.*, 793 F.Supp. 925 (N.D. Cal. 1992). The application of Article III standing requirements in those cases can affect only the forum. By contrast, the Fifth Circuit determined that in a § 1442(a) removal case, a standing defect leads not to remand but to dismissal, with prejudice, of the plaintiff's claims. See *IPPL*, 895 F.2d. 1056, 1061 (5th Cir. 1990). The Fifth Circuit reasoned that a § 1442(a)(1) case cannot be remanded because the federal officer (or perhaps agent) has an absolute *right* to a federal forum for the adjudication of his defense; the Court did not advert to the unavailability of dismissal under § 1447(c).[4]

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934 (4th Cir. 1986) ("*IBR*"), as if the case were on all fours with the present case and supported the result below. In *IBR*, the plaintiffs brought suit in a Maryland state court, asserting state law claims *combined* with a claim under the federal Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* Removal was uncontested, but the court found that it was supported by the federal claim. Concluding that the plaintiffs had no standing to sue under the Animal Welfare Act, which in any case was not subject to private enforcement, the court dismissed the suit. With respect to the state-law claims, however, the Fourth Circuit made plain that it could not exercise pendent jurisdiction given the failure of the federal claim; the dismissal was without prejudice to the plaintiffs' rights to re-urge their state claims. 799 F.2d at 940-941. Because the monkeys were transported to Louisiana, the state-law claims were ultimately asserted under Louisiana, not Maryland law.

[4] Were a lower court to do the wrong thing in the right way – *remanding* upon a finding that the plaintiff lacked Article III standing to pursue his claims – the issue would be unappealable. This Court's review is warranted to establish the applicable rule of law.

That dismissal was ordered in this case before the federal defense was addressed – forever foreclosing consideration of the federal controversy – due to the improper application of Article III standing requirements to Petitioners' state law claims was an unconscionable error warranting this Court's grant of *certiorari*.

### B. REMOVAL WAS IMPROPER; TULANE DID NOT "ACT UNDER" NIH WITHIN THE MEANING OF 28 U.S.C. § 1442(a)

Respondents contend that the issue whether Tulane acted under an officer of the United States is a "fact-bound" issue unworthy of this Court's review. Because the lower courts neither reached nor decided important legal questions presented by Tulane's removal, the factual determinations below were incomplete and nondispositive. No consideration was given to the question whether it is possible to "act under" an officer who himself lacks control. Therefore, NIH incorrectly argues that Petitioners' contention was "rejected." (NIH Opposition, p. 21). Instead, the lower courts permitted NIH to confer federal jurisdiction on Tulane by its support for the removal, regardless of the nonexistence of any genuine federal interest that would warrant the exercise of federal jurisdiction. The fact that NIH's authority over the monkeys was completely circumscribed by a private entity presents a question of law the lower courts improperly avoided.

A related irregularity arose from the fact that no single federal officer exercised control over Tulane. Were the shifting involvement of federal officers attributable,

as NIH suggests in brief, to the delegation of authority by an agency head to his subordinates (NIH Opposition, p. 22), the multiplication of officers would be of no moment – and in any case the error in the removal petition could be cured by naming the supervising officer. In this case, however, the more amorphous shape of governmental involvement is far more troubling: federal employees, crossing agency lines, not answerable to one another, and working out of their homes and on weekends to support a *private* enterprise, with ultimate control residing in a *private entity* do not establish, as a matter of law, the presence of a federal interest apparently contemplated by § 1442(a).

The confusion in the lower courts surrounding the "acting under" requirement, combined with the improper broadening of federal jurisdiction to embrace this fundamentally private dispute, warrant this Court's review.

## CONCLUSION

This Court's direction is needed on the proper interpretation of 28 U.S.C. § 1442(a) and on the standing requirements applicable to a § 1442(a) case.

Respectfully submitted,

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